A

TAN BUN TEET & ORS

v.

MENTERI SAINS, TEKNOLOGI DAN INOVASI MALAYSIA & ORS

B

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
AZAHAR MOHAMED JCA
AZIAH ALI JCA
C [CIVIL APPEAL NO: C-01(IM)(NCVC)-490-11/2012]
18 MARCH 2013

CIVIL PROCEDURE: *Stay of proceedings - Application for - Application for interim stay until final disposal of judicial review*
D *proceedings - Whether application sustainable - Whether appellants had locus standi*

CIVIL PROCEDURE: *Injunction - Injunction against government - Application for - Whether injunction would interfere with public duty -*
E *Whether s. 29 of the Government Proceedings Act 1956 protects public authority from injunctive orders - Specific Relief Act 1950, s. 54 - Rules of Court 2012, O. 53 r. 2(2)*

This was an appeal by the appellants against the High Court decision dismissing the appellants' application for an interim stay
F until the final disposal of the pending judicial review proceedings. The appellants were residents of the town of Kuantan and/or registered proprietors of landed properties in the areas in the District of Kuantan. The first respondent, the Minister of Science, Technology and Innovation, was responsible and empowered over
G the provisions of the Atomic Energy Licensing Act 1984 ('AELA') and the rules and guidelines made pursuant to the said Act. The second respondent was the Atomic Energy Licensing Board empowered under the AELA to set the safety level to be complied with under any projects or activities that used radioactive materials
H and/or produce radioactive waste or residue. The third respondent, Lynas Corporation Ltd, was a listed company under the Australian Securities Exchange incorporated in Australia while the fourth respondent, Lynas Malaysia Sdn Bhd, was a fully-owned subsidiary of the third respondent. On 30 January 2012, a
I Temporary Operating License ('TOL') was approved by the second respondent to the fourth respondent. On 7 February 2012, the

appellants together with three other individuals filed a notice of appeal to the first respondent pursuant to s. 32 of the AELA against the decision of the second respondent. However, in a letter dated 27 March 2012, the applicants withdrew from proceeding with the appeal leaving the remaining individuals to proceed with the said appeal. On 13 June 2012, the first respondent dismissed the appeal. The appellants then filed judicial review proceedings, *inter alia*, for an order of *certiorari* to quash the decision of the first respondent and for an order prohibiting the first respondent from issuing any temporary or permanent license to the fourth respondent. On 3 September 2012, the second respondent issued the TOL to the fourth respondent. Subsequently, on 14 September 2012, the appellants filed an application ('encl. 13'), the subject matter of the appeal herein, against the first and second respondents, seeking, *inter alia*, (i) that the decisions of the first and second respondents in relation to the approval of the TOL, as well as the exercise of the rights under the TOL be forthwith stayed until final disposal of these judicial review proceedings; and (ii) alternatively, an interlocutory injunction restraining the second respondent from issuing further licenses, permits or approvals in relation to and following upon its decision made on 30 January 2012 to approve a TOL to the fourth respondent. The High Court, in dismissing the appellants' application, held that since the TOL had been issued to the fourth respondent, the first and second respondents were no longer involved, hence it was impossible to stay the decisions of the first and second respondent. Dissatisfied with the said decision, the appellants appealed.

Held (dismissing appeal with costs)
Per Azahar Mohamed JCA delivering the judgment of the court:

(1) The application to stay the decisions of the two respondents approving the TOL was unsustainable as the TOL had since been issued to the fourth respondent for the Lynas Advanced Materials Plant ('LAMP') project. Whatever rights, duties and responsibilities accruing under the TOL were now the responsibilities of the fourth respondent. The fourth respondent was now the legal and valid holder of the TOL, thus it was not possible or practical for the decision to be stayed. Furthermore, the applicants had withdrawn from

proceeding with the appeal on 27 March 2012 before the first respondent under s. 32 of the AELA. Hence, there was merit in the arguments that the appellants were not in any position to complain about the first respondent's decision, and therefore they had no *locus standi* to apply for an injunction/stay application against the first and second respondents. (para 10)

(2) The exercise of the rights under the TOL had passed to the fourth respondent, not the second respondent anymore. The relief sought by the appellants would legally and commercially affect the third and fourth respondents directly as the fourth respondent was the holder of the TOL. At all material times, the third and fourth respondents were not named or made parties to the judicial review proceedings and were not parties to the stay application in the High Court. As the outcome of granting the stay would be to affect detrimentally the operations of the fourth respondent, the failure on the part of the appellants at the material time to include the third and fourth respondents from the very outset in the injunction/stay application was fatal to their applications. Hence, there were really no serious issues to be tried in context of the appellants' injunction/stay application. (para 11)

(3) In judicial review proceedings, an application for an injunction could only be made pursuant to O. 53 r. 2(2) of the Rules of Court 2012. Further, an injunction, interim/interlocutory or permanent, could not be granted against the government under s. 29 of the Government Proceedings Act 1956 ('GPA') and s. 54 of the Specific Relief Act 1950 ('SPA') *(Lim Kit Siang v. United Engineers (M) Bhd)*. If the relief sought for was granted, this would interfere with the public duty of the second respondent under the AELA and as such, s. 29 of the GPA protects the second respondent, being a public authority, from any form of injunctive orders. (paras 13, 14 & 16)

(4) The learned judge had exercised her discretion correctly in dismissing the appellants' injunction/stay application. The appellants had failed to show any valid grounds warranting interference in the exercising of the learned judge's discretion. (para 17)

Bahasa Malaysia *Translation Of Headnote*

Ini adalah rayuan oleh perayu-perayu terhadap keputusan Mahkamah Tinggi dalam menolak permohonan perayu-perayu untuk perintah penangguhan interim sehingga pelupusan muktamad prosiding semakan kehakiman. Perayu-perayu adalah penduduk Bandar Kuantan dan/atau pemilik berdaftar hartanah-hartanah di kawasan dalam daerah Kuantan. Responden pertama, Menteri Sains, Teknologi dan Inovasi, bertanggungjawab dan diberikan kuasa ke atas peruntukan-peruntukan Akta Perlesenan Tenaga Atom 1984 ('AELA') dan peraturan-peraturan serta garis panduan yang dibuat menurut Akta tersebut. Responden kedua adalah Lembaga Perlesenan Tenaga Atom yang diberikan kuasa untuk menetapkan tahap keselamatan yang perlu dipatuhi di bawah apa-apa projek atau aktiviti yang menggunakan bahan-bahan radioaktif dan/atau menghasilkan sisa radioaktif. Responden ketiga, Lynas Corporation Ltd, adalah sebuah syarikat yang disenaraikan di bawah Bursa Sekuriti Australia yang diperbadankan di Australia dan responden keempat, Lynas Malaysia Sdn Bhd, merupakan anak syarikat milik penuh responden ketiga. Pada 30 Januari 2012, Lesen Operasi Sementara ('TOL') telah diluluskan oleh responden kedua kepada responden keempat. Pada 7 Februari 2012, pemohon-pemohon, bersama-sama dengan tiga orang individu yang lain telah memfailkan notis rayuan kepada responden pertama di bawah s.32 AELA terhadap keputusan responden kedua. Walau bagaimanapun, dalam surat bertarikh 27 Mac 2012, pemohon-pemohon telah menarik diri daripada meneruskan dengan rayuan dan meninggalkan individu-individu yang lain untuk meneruskan dengan rayuan tersebut. Pada 13 Jun 2012, responden pertama telah menolak rayuan tersebut. Perayu-perayu kemudian memfailkan prosiding semakan kehakiman, antara lain, untuk perintah *certiorari* membatalkan keputusan responden pertama dan untuk perintah melarang responden pertama daripada mengeluarkan apa-apa lesen sementara atau kekal kepada responden keempat. Pada 3 September 2012, responden kedua telah mengeluarkan TOL kepada responden keempat. Pada 14 September 2012, perayu-perayu telah memfailkan permohonan ('lampiran 13'), hal perkara rayuan ini, terhadap responden pertama dan kedua, memohon antara lain (i) bahawa keputusan responden pertama dan kedua berhubungan dengan kelulusan TOL, serta perlaksanaan hak-hak di bawah TOL hendaklah ditangguhkan dengan serta-merta sehingga pelupusan muktamad prosiding semakan kehakiman ini; dan

A (ii) secara alternatif, injunksi interlokutori untuk menghalang responden kedua daripada mengeluarkan apa-apa lesen, permit atau kelulusan berhubung dan berikutan keputusan yang dibuat pada 30 Januari 2012 untuk meluluskan TOL kepada responden keempat. Mahkamah Tinggi, dalam menolak permohonan perayu-
B perayu, memutuskan bahawa oleh kerana TOL telah dikeluarkan kepada responden keempat, responden pertama dan kedua tidak lagi terlibat, oleh itu ia adalah mustahil untuk menangguhkan keputusan-keputusan responden pertama dan kedua. Tidak berpuas hati dengan keputusan tersebut, perayu-perayu merayu.

C **Diputuskan (sebulat suara menolak rayuan dengan kos):**
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

D **(1)** Permohonan menangguhkan keputusan kedua-dua responden yang telah meluluskan TOL adalah tidak mapan kerana TOL telah dikeluarkan kepada responden keempat bagi projek Lynas Advanced Materials Plant ('LAMP'). Apa-apa hak, tugas dan tanggungjawab yang terakru di bawah TOL adalah kini di
E bawah tanggungan responden keempat. Responden keempat adalah pemegang undang-undang dan sah TOL, oleh itu adalah mustahil atau tidak praktikal untuk keputusan tersebut ditangguhkan. Tambahan lagi, pemohon-pemohon telah menarik balik daripada meneruskan dengan prosiding rayuan pada 27
F Mac 2012 di hadapan responden pertama di bawah s. 32 AELA. Oleh itu, terdapat merit dalam hujahan-hujahan bahawa perayu-perayu tidak berada dalam mana-mana kedudukan untuk membuat aduan berkenaan keputusan responden pertama, dan dengan itu mereka tidak mempunyai *locus standi* untuk
G memohon injunksi/permohonan penangguhan terhadap responden pertama dan kedua.

(2) Pelaksanaan hak-hak di bawah TOL telah diberikan kepada responden keempat, bukan responden kedua. Relif yang dituntut oleh perayu-perayu akan, dari segi undang-undang dan
H komersial, memberi kesan kepada responden ketiga dan keempat secara langsung kerana responden keempat adalah pemegang TOL. Pada setiap masa material, responden ketiga dan keempat tidak dinamakan atau tidak dijadikan pihak kepada prosiding semakan kehakiman dan bukan pihak-pihak kepada
I permohonan penangguhan di Mahkamah Tinggi. Oleh kerana keputusan membenarkan penangguhan akan memberi kesan

secara detrimen kepada operasi responden keempat, kegagalan perayu-perayu pada masa material untuk memasukkan responden ketiga dan keempat dari awal-awal permohonan injunksi/penangguhan adalah fatal kepada permohonan mereka. Oleh itu, tiada isu-isu yang serius untuk dibicarakan dalam konteks permohonan injunksi/penangguhan perayu-perayu.

(3) Dalam prosiding semakan kehakiman, permohonan untuk injunksi hanya boleh dibuat di bawah A. 53 k. 2(2) Kaedah-Kaedah Mahkamah 2012. Seterusnya, injunksi, interim/ interlokutori atau kekal, tidak boleh dibenarkan terhadap kerajaan di bawah s. 29 Akta Prosiding Kerajaan 1956 ('GPA') dan s. 54 Akta Relief Spesifik 1950 ('SPA') *(Lim Kit Siang v. United Engineers (M) Bhd)*. Jika relif yang dipohon dibenarkan, ini akan mengganggu tugas awam responden kedua di bawah AELA dan dengan itu, s. 29 GPA melindungi responden kedua, sebagai pihak berkuasa awam, daripada sebarang bentuk perintah injunksi.

(4) Yang arif hakim telah melaksanakan budi bicaranya dengan betul dalam penolakan permohonan injunksi/penangguhan perayu-perayu. Perayu-perayu telah gagal menunjukkan wujudnya alasan-alasan sah yang mewajarkan campur tangan dalam pelaksanaan budi bicara yang arif hakim.

Case(s) referred to:

Belize Alliance of Conservation Non-Governmental Organisation v. Department of Environment of Belize and Another [2003] 1 WLR 2839 ***(refd)***

Bursa Malaysia Securities Bhd v. Gan Boon Aun [2009] 5 CLJ 698 CA ***(refd)***

Godfrey Philips (Malaysia) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia [2011] 9 CLJ 670 HC ***(refd)***

Hadmor Productions Ltd v. Hamilton and Anor [1983] 1 AC 191 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & 2 Ors [1995] 1 CLJ 293 CA ***(refd)***

Lian Keow Sdn Bhd & Anor v. Overseas Credit Finance (M) Bhd & Ors [1982] CLJ 350; [1982] 2 CLJ (Rep) 182 FC ***(refd)***

Lim Kit Siang v. United Engineers (M) Bhd & Ors [1987] 2 CLJ 195; [1987] CLJ (Rep) 170 SC ***(foll)***

Mukundan Maniam & 7 Ors v. Ratiga Markandan & 11 Ors [2009] 1 LNS 586 CA ***(refd)***

Regina v. Inspectorate of Pollution Ex P Greenpeace Ltd (No. 1) [1994] 1 WLR 570 ***(refd)***

Superintendant of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd [2009] 6 CLJ 751 CA ***(refd)***
Tien Ik Sdn Bhd & 4 Ors v. Peter Kuok Khoon Hwong [1993] 1 CLJ 9 SC ***(refd)***
Tsoi Ping Kwan v. Loh Lai Ngoh & Anor [1997] 3 CLJ 552 CA ***(refd)***
Zaidin Abd Ghani v. Raja Raman Nair & Ors [2001] 6 CLJ 558 HC ***(refd)***

Legislation referred to:
Atomic Energy Licensing Act 1984, s. 32(5)
Government Proceedings Act 1956, s. 29
Rules of Court 2012, O. 53 r. 2(3)
Rules of the High Court 1980, O. 53 r. 3
Specific Relief Act 1950, s. 54

For the appellants - Bastian Vendargon (Hon Kai Ping, R Sarengapani, Anne Vendargon & Gene Vendargon with him); M/s Bastian Vendargon
For the 1st & 2nd respondents - Shamsul Bolhasan Khalid (Nurul Farhana Khalid with him) SFCs
For the 3rd & 4th respondents - Cecil Abraham (Wong Kah Hui, Sunil Abrahim, Idza Haidar Idzam & Emily Chin with him); M/s Jeff Leong

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed JCA:

[1] This was an appeal by the appellants (the applicants in the High Court) against the decision of the learned judge of the Kuantan High Court given on 8 November 2012 dismissing the appellants' application (encl. 13) dated 14 September 2012 for an interim stay until the final disposal of the pending judicial review proceedings. We heard the appeal on 19 December 2012, wherein at its conclusion we unanimously dismissed it with costs. We now give our reasons for so deciding. For convenience, we will refer to the parties in this judgment to the title assigned to them in the court below.

[2] To make the point under discussion easier to understand, we think it is useful to state briefly the factual background and the sequence of events leading to the present appeal. The applicants are residents of the town of Kuantan, Kg Sungai Ular, Damansara Kuantan Township, and/or are the registered proprietors of landed

properties in the areas in the District of Kuantan and Gebeng, Pahang. The 1st respondent is the Minister of Science, Technology and Innovation and is responsible and empowered over the provisions of the Atomic Energy Licensing Act 1984 ('AELA') and the rules and guidelines made pursuant to the said Act. The 2nd respondent is the Atomic Energy Licensing Board empowered under the AELA to set the safety level to be complied under any projects or activities that use radioactive materials and/or produce radioactive waste or residue. The 3rd respondent, Lynas Corporation Ltd is a listed company under the Australian Securities Exchange incorporated in Australia. The 4th respondent, Lynas Malaysia Sdn Bhd, which was incorporated in Malaysia under the Companies Act 1965, is a fully owned subsidiary of the 3rd respondent.

[3] One of the responsibilities of the 2nd respondent is to scrutinise and approve applications for licenses for a project by the 4th respondent's rare earth processing plant referred to as Lynas Advanced Materials Plant ('LAMP') in Gebeng Industrial Area (hereinafter referred to as 'GIA') Kuantan, Pahang. The main material utilised by LAMP is the rare earth called "lanthanide" concentrate which is obtained from lanthanide deposit mining operations from a mine in Mount Weld, Australia. These materials are used in the manufacture of modern equipments and devices such as disk drives, catalytic converter, mobile phones, and flat screen display. The 4th respondent has obtained approval of the Mining License to produce "rare earth oxides and carbonates" in the GIA on 22 January 2008. The approval was given subject to conditions, especially to fulfil the various provisions in the AELA and the Environmental Quality Act 1974.

[4] On 30 January 2012, a Temporary Operating License ('TOL') was approved by the 2nd respondent to the 4th respondent. After that, on 7 February 2012, the applicants together with three other individuals had filed a notice of appeal to the 1st respondent pursuant to s. 32 of the AELA against the decision of the 2nd respondent made on 30 January 2012. However, in a letter dated 27 March 2012, the applicants withdrew from proceeding with the appeal leaving the remaining individuals to proceed with the said appeal. On 13 June 2012, the 1st respondent had dismissed the appeal. Then, the applicants had on 14 July 2012 filed the judicial review proceedings (thereafter leave to commence judicial proceedings was granted on 28 August 2012) seeking the following reliefs:

A (1) To apply for an order of *certiorari* for the purpose of quashing the decision of the 1st respondent made on 13 June 2012 disallowing the appeal of Ismail bin Abu Bakar, Abujavalli a/p V Raman and Tan Ah Meng with the imposition of two additional conditions thus affirming the decision of the 2nd
B respondent made on 30 January 2012 granting TOL to the 4th respondent subject to five conditions for the operation of LAMP in Gebeng, Kuantan;

(2) To apply for an order of prohibition prohibiting the 1st
C respondent from issuing any temporary or permanent license to the 4th respondent unless and until:

(i) the 4th respondent submits a detailed environmental impact assessment ('DEIA') report to the 2nd respondent and subject to the approval of the DEIA by the Director
D General of the Department of Environment ('DOE');

(ii) the 4th respondent submits a fresh radiological impact assessment (RIA) report to the 2nd respondent for its approval;

E

(iii) the 4th respondent submits a fresh Safety Case for Radioactive Waste Disposal (SCRWD) and Radioactive Waste Management Plan (RWMP) proposals to the 2nd respondent for its approval made pursuant to the
F recommendations of the International Atomic Energy Agency ('IAEA') report dated 30 June 2011.

(3) That the said TOL be stayed, pursuant to O. 53 r. 3(5) of the Rules of the High Court 1980 and/or under the inherent jurisdiction of this court, pending the determination of these
G proceedings;

(4) A declaration that the 1st respondent had exhibited a real likelihood of bias in favour of the LAMP project, and therefore ought not to have adjudicated on any appeal against the
H decision of the 2nd respondent to grant the TOL to the LAMP project pursuant to s. 32 of AELA.

(5) A declaration that the 1st respondent had acted in excess of jurisdiction, and therefore the ouster clause in s. 32(5) AELA
I is of no effect.

[5] On 3 September 2012, the 2nd respondent issued the TOL to the 4th respondent. Not long after that, on 14 September 2012, the applicants filed an application (encl. 13), which is the subject matter of the appeal herein, against the 1st and 2nd respondents seeking for an order that:

(1) The decisions of the 2nd and 1st respondents made on 30 January 2012 and 13 June 2012 respectively in relation to the approval of the TOL for the LAMP in Gebeng be forthwith stayed until the final disposal of these judicial review proceedings;

(2) That the exercise of the rights under the TOL issued on or about 3 September 2012 pursuant to the decisions of the 2nd and 1st respondents made on 30 January 2012 and 13 June 2012 respectively, be forthwith stayed till the final disposal of these judicial review proceedings;

(3) Alternatively, an interlocutory injunction be granted restraining the 2nd respondent from issuing any further licenses, permits, or approvals in relation to, and following upon its decision made on 30 January 2012 to approve a TOL to the 4th respondent in respect of its LAMP at Gebeng till final disposal of these judicial review proceedings, upon the undertaking of the applicants to abide by any order of damages that may be made by the court in case the court should hereafter be of opinion that the 2nd respondent shall have sustained by reason of this Order, which the applicants ought to pay.

[6] An interim stay was initially granted by the High Court pending the *inter parte* hearing of the applicants' injunction/stay application on 10 October 2012. The applicants' application was heard on 10 October 2012 and a decision was delivered on 8 November 2012. As we have indicated earlier, the applicants' application was dismissed by the High Court on 8 November 2012. The applicants being dissatisfied with the decision of the High Court now appealed to the Court of Appeal.

[7] In considering this appeal, we have closely scrutinised the judgment of the learned High Court Judge. In her judgment, the learned judge, among others, held that since the TOL has been issued to the 4th respondent, the 1st and 2nd respondents are no longer involved and hence it was impossible to stay the decisions

of the 1st and 2nd respondents and even then s. 29 of the Government Proceedings Act 1956 (GPA) and s. 54 of the Specific Relief Act 1950 (SPA) need to be considered so as to preclude any injunctive order or otherwise being granted. The learned judge also considered what is the correct test for a stay application premised on the factual matrix of the present case and having considered the decision in *Regina v. Inspectorate of Pollution Ex P Greenpeace Ltd (No 1)* [1994] 1 WLR 570, decided that it would only be proper if the 3rd and 4th respondents were made parties at the very outset before an injunction sought. The learned judge then decided that the 3rd and 4th respondents should have been made a party to the judicial review proceedings at the outset.

[8] It is an established principle of law that it is only in limited and narrow circumstances that an appellate court will interfere with the exercise of discretion on the part of the trial judge in granting or otherwise an application for interim injunctive relief. The function of the appellate court is not to substitute its exercise of discretion for that of the High Court but merely one of review. The decision to refuse the application for an injunction/stay is an exercise of discretion on the part of the trial court. An appellate court should be slow to interfere in an exercise of discretion (see: *Hadmor Productions Ltd v. Hamilton and Anor* [1983] 1 AC 191, *Lian Keow Sdn Bhd & Anor v. Overseas Credit Finance (M) Bhd & Ors* [1982] CLJ 350; [1982] 2 CLJ (Rep) 182, *Tien Ik Sdn Bhd & 4 Ors v. Peter Kuok Khoon Hwong* [1993] 1 CLJ 9; [1992] 2 MLJ 689, *Tsoi Ping Kwan v. Loh Lai Ngoh & Anor* [1997] 3 CLJ 552; [1997] 3 MLJ 165 and *Regina v. Inspectorate of Pollution Ex P Greenpeace Ltd (No. 1)* [1994] 1 WLR 570).

[9] It is also settled law that the granting of leave for an application for judicial review does not in itself serve as an automatic stay of the order and/or decision that the judicial review proceedings sought to quash and/or impugn and/or set aside (see: O. 53 r. 3(5) of the Rules of Court 2012). Now, the principle which needs to be taken into consideration before the granting of a stay in judicial review proceedings is similar to the granting of an application for interlocutory injunction (see: *Bursa Malaysia Securities Bhd v. Gan Boon Aun* [2009] 5 CLJ 698; [2009] 4 MLJ 695 and *Godfrey Philips (Malaysia) Sdn Bhd v. Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam), Kementerian Kesihatan, Malaysia* [2011] 9 CLJ 670).

[10] That being the principles to be applied, we now turn to consider the specific issues which arise for determination in this appeal. In the injunction/stay application, the first relief sought by the applicants is to stay the decisions of the 1st and 2nd respondents. It was argued by learned counsel for the appellants that there were special circumstances to grant an interim stay as prayed on the basis that the *status quo* ought to be maintained, and not altered, till the appeal is disposed of. It was further argued that the judicial proceedings seek, *inter alia*, to quash the respective decisions of the 1st and 2nd respondents, which if successful, would result in there being no decisions at all. We do not agree with these arguments. In our judgment, the application to stay the decisions of the two respondents approving the TOL is unsustainable as the TOL had since been issued to the 4th respondent for the LAMP project. Whatever rights, duties and responsibilities accruing under the TOL are now the responsibilities of the 4th respondent. The position would have been different if the TOL had not been issued. The undisputed fact is that the 4th respondent is now the legal and valid holder of the TOL. Viewed in this way, it is not possible or practical for the decision to be stayed. Furthermore, as we have mentioned earlier, in a letter dated 27 March 2012 the applicants withdrew from proceeding with the appeal before the 1st respondent under s. 32 of AELA. Hence, in our view, there is merit in the arguments that the appellants are not in any position to complain about the 1st respondent's decision, and therefore they had no *locus standi* to apply for an injunction/stay application against the 1st and 2nd respondents (see: *Mukundan Maniam & 7 Ors v. Ratiga Markandan & 11 Ors* [2009] 1 LNS 586; [2011] 6 MLJ 98).

[11] This leads on to the second relief sought by the applicants in the injunction/stay application. That is, the exercise of the rights under the TOL to be stayed forthwith. In this regard it was argued by learned counsel for the appellants that if the 4th respondent starts operations, the judicial proceedings could be nugatory as the damage that could result may be irreparable, and irreversible. It is important to bear in mind that the applicants sought to restrain the issuance of the TOL and the exercise of the rights under the TOL which had been given to the 4th respondent. In this regard, relying on the case of *Keet Gerald*

Francis Noel John v. Mohd Noor @ Harun Abdullah & 2 Ors [1995] 1 CLJ 293; [1995] 1 MLJ 193, it is the argument of learned counsel for the 3rd and 4th respondents that there are really no serious issues to be tried in the context of the applicants' injunction/stay application. We find there is much force in this argument. The significant point here is that it cannot be disputed that the rights under the TOL can only be exercised by the 4th respondent. The exercise of the rights under the TOL has passed to the 4th respondent, not the 2nd respondent anymore. The relief sought by the applicants would legally and commercially affect the 3rd and 4th respondents directly as the 4th respondent is the holder of the TOL. At this point, we should highlight an important fact. It is this. At all material times the 3rd and 4th respondents were not named or made parties to the judicial review proceedings and more than that were not parties to the stay application in the High Court. For this, it is all the more striking that the 3rd and 4th respondents had to file an application to intervene to be added as parties. In this respect, the case of *Regina v. Inspectorate of Pollution Ex P Greenpeace Ltd (supra)*, which was alluded to by the learned High Court Judge in her judgment, discussed the issue of stay and injunctions where similarly, an affected party, was not made a party to the proceedings. In much the same way, in the present case, as the outcome of granting the stay will be to effect detrimentally the operations of the 4th respondent, we take the view that the failure on the part of the applicants at the material time to include the 3rd and 4th respondents from the very outset in the injunction/stay application is fatal to their applications. Hence, in our judgment there are really no serious issues to be tried in the context of the appellants' injunction/stay application. Moreover, the balance of equity must not be weighed as between the appellants and the 1st and 2nd respondents only, but must be ascertained with regards to the rights and interests of the 3rd and 4th respondents as well, having invested large sums of money for its operations. The 3rd and 4th respondents have invested a sum of around RM1.7 billion as at 21 March 2012 in the LAMP project. In light of the huge investments by the 3rd and 4th respondents, it is imperative that the appellants make an undertaking as to damages and financial loss to be suffered by the 4th respondent, and not merely undertaking as to damages, if any, to be suffered by the 1st and 2nd respondents. It is trite law that an applicant for

interlocutory injunction must provide valuable undertaking to pay damages and further the applicant must show that he has the means to fulfil the said undertaking (see: *Zaidin Abd Ghani v. Raja Raman Nair & Ors* [2001] 6 CLJ 558 and *Belize Alliance of Conservation Non-Governmental Organisation v. Department of Environment of Belize and Another* [2003] 1 WLR 2839 and *Regina v. Inspectorate of Pollution Ex P Greenpeace Ltd*). In our judgment, the appellants as private individuals have not shown proof of their financial standing to make good their bare undertaking, given under para. 9 of the appellant's affidavit in support of the injunction/stay application.

[12] We turn now to the third alternative relief sought by the applicants in the injunction/stay application, which is an interlocutory injunction to restrain the 2nd respondent from issuing any further licenses, permits, or approvals in relation to, and following upon its decision made on 30 January 2012 to approve a TOL to the 4th respondent in relation to the LAMP project. It is the contention of the learned Senior Federal Counsel for the 1st and 2nd respondents that the application by the applicants for an interlocutory injunction is misconceived by virtue of the provisions of s. 29 of the GPA and s. 54 of the SPA. We find this argument persuasive.

[13] In the first place, we are of the view that in judicial review proceedings an application for an injunction can only be made pursuant to O. 53 r. 2(3) of the Rules of Court 2012, which provides as follows:

> (3) Upon the hearing of an application for judicial review, the court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any court orders, including an order of injunction or monetary compensation.

Hence, we are of the view that an application for an injunction could only be made at the substantive judicial review hearing and not before it.

[14] But that is not all. An injunction, interim/interlocutory or permanent, cannot be granted against the government under s. 29 of the GPA and under s. 54 of the SPA. The authority to support this proposition can be found in the decision of our then Supreme Court in *Lim Kit Siang v. United Engineers (M) Bhd & Ors* [1987] 2 CLJ 195; [1987] CLJ (Rep) 170 SC. In particular, the relevant passage from the judgment states:

A This means that no injunction could be directly or indirectly issued against the Government or its officers. Similarly, the court has no jurisdiction to grant an injunction against a private litigant if the injunction would have the effect of 'restraining the Government or its officers from performing their functions. This has been the interpretation which has been placed by the courts in England as well as in this country.

B

[15] The principle of law enunciated above has been reaffirmed by the Court of Appeal in *Superintendant of Lands and Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd* [2009] 6 CLJ 751.

C

[16] It follows from this, after giving due considerations to the submissions of all parties, if the relief sought is granted, this will interfere with the public duty of the 2nd respondent under the AELA and as such, s. 29 of the GPA protects the 2nd respondent, being a public authority, from any form of injunctive orders.

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[17] For all the reasons stated, we are of the view that the learned judge had exercised her discretion correctly in dismissing the applicants' injunction/stay application. The decision of the learned judge in dismissing the application was correct in law and fact. All considered, in our judgment, the learned judge was justified in so deciding. With respect, the applicants have failed to show any valid grounds warranting our interference in the exercise of the learned judge's discretion.

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[18] In the result, we had unanimously dismissed this appeal with costs in the sum of RM10,000 to the 1st and 2nd respondents. We also awarded the same amount as costs to the 3rd and 4th respondents. Deposits refunded to the appellants.

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